

## UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

Michael Kitchen

*Petitioner*

v.

The Honorable Judge Scott W. Nusbaum  
Common Pleas Court of Ross County, Ohio*Respondent**(name of warden or authorized person having custody of petitioner)*

Case No. \_\_\_\_\_

*(Supplied by Clerk of Court)*

## PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

## Personal Information

1. (a) Your full name: Michael Thomas Kitchen
- (b) Other names you have used: N/A
2. Place of confinement:
  - (a) Name of institution: Ross County, Ohio Court of Common Pleas
  - (b) Address: 2 North Paint Street, Chillicothe, Ohio 45601
- (c) Your identification number: \_\_\_\_\_
3. Are you currently being held on orders by:
 

☐ Federal authorities      ☐ State authorities      ☒ Other - explain:  
 I am admitted to bail pending retrial in Case No. 16CR000384, Ross County Court of Common Pleas
4. Are you currently:
 

☐ A pretrial detainee (waiting for trial on criminal charges)  
☐ Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime  
 If you are currently serving a sentence, provide:

  - (a) Name and location of court that sentenced you: \_\_\_\_\_
  - (b) Docket number of criminal case: \_\_\_\_\_
  - (c) Date of sentencing: \_\_\_\_\_

☐ Being held on an immigration charge  
☒ Other (explain): I am in pretrial release, having been admitted to bail under conditions awaiting retrial following an order of mistrial which concluded my first trial.

## Decision or Action You Are Challenging

5. What are you challenging in this petition:
 

☐ How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)

- ☐ Pretrial detention  
☐ Immigration detention  
☐ Detainer  
☐ The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)  
☐ Disciplinary proceedings  
☒ Other (explain): I assert that further prosecution of the indictment violates my right to be free from double jeopardy secured to me under the Fifth Amendment. A mistrial was declared during my first trial due to prosecutorial misconduct. My retrial is currently scheduled to begin on 09/17/2019.

6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: Ross County Court of Common Pleas

(b) Docket number, case number, or opinion number: Trial Court Case No. 16CR000384

(c) Decision or action you are challenging (for disciplinary proceedings, specify the penalties imposed):

The trial court overruled my motion to dismiss the indictment on double jeopardy grounds on 04/05/2018. I appealed to the Ross County Court of Appeals, which affirmed the trial court's decision on 12/07/2018. I filed a jurisdictional appeal to the Supreme Court of Ohio, which was denied on 04/03/2019.

(d) Date of the decision or action: 04/03/2019

### Your Earlier Challenges of the Decision or Action

#### 7. First appeal

Did you appeal the decision, file a grievance, or seek an administrative remedy?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Ross County Court of Appeals, Fourth Appellate District.

(2) Date of filing: 05/04/2018

(3) Docket number, case number, or opinion number: 18CA003640

(4) Result: Affirmed trial court's overruling of Petitioner's Motion to Dismiss on the basis of double jeopardy.

(5) Date of result: 12/07/2018

(6) Issues raised: 1) Whether the trial court erred in denying Petitioner's Motion to Dismiss on double jeopardy grounds when the State and Assistant Prosecutor repeatedly engaged in misconduct during the September 19, 2017 jury trial and the Assistant Prosecutor goaded the Petitioner into requesting a mistrial.

(b) If you answered "No," explain why you did not appeal:

#### 8. Second appeal

After the first appeal, did you file a second appeal to a higher authority, agency, or court?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Supreme Court of Ohio(2) Date of filing: 01/22/2019(3) Docket number, case number, or opinion number: 2019-0098(4) Result: The Supreme Court of Ohio declined to accept jurisdiction.(5) Date of result: 04/03/2019

(6) Issues raised: Propositions of Law presented to Supreme Court of Ohio: 1) The Double Jeopardy Clauses of the United States and Ohio Constitutions prohibit the retrial of a criminal defendant following a mistrial, when the State provoked the defendant to seek a mistrial, and caused the trial court to grant a mistrial, by engaging in prosecutorial misconduct intended to cause a mistrial; 2) Intent to cause a mistrial shall be inferred when the State engages in a series of acts of prosecutorial misconduct by repeatedly violating the trial court's orders barring the State from introducing certain evidence during a trial and the State would benefit from, and not be barred from, introducing such evidence during a retrial.

(b) If you answered "No," explain why you did not file a second appeal: \_\_\_\_\_

9. **Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

☐ Yes☒ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Docket number, case number, or opinion number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

(b) If you answered "No," explain why you did not file a third appeal: The Supreme Court of Ohio is the court of last resort.

10. **Motion under 28 U.S.C. § 2255**

In this petition, are you challenging the validity of your conviction or sentence as imposed?

☐ Yes☒ No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

☐ Yes☐ No

If "Yes," provide:

(1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date of filing: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

- (b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

☐ Yes

☒ No

If "Yes," provide:

(1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date of filing: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

- (c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence: N/A

# 11. Appeals of immigration proceedings

Does this case concern immigration proceedings?

☐ Yes

☒ No

If "Yes," provide:

- (a) Date you were taken into immigration custody: \_\_\_\_\_

- (b) Date of the removal or reinstatement order: \_\_\_\_\_

- (c) Did you file an appeal with the Board of Immigration Appeals?

☐ Yes

☐ No

If "Yes," provide:

(1) Date of filing: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Result: \_\_\_\_\_

(4) Date of result: \_\_\_\_\_

(5) Issues raised: \_\_\_\_\_

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(d) Did you appeal the decision to the United States Court of Appeals?

☐ Yes

☐ No

If "Yes," provide:

(1) Name of court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Case number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

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12. **Other appeals**

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition?

☐ Yes

☒ No

If "Yes," provide:

(a) Kind of petition, motion, or application: \_\_\_\_\_

(b) Name of the authority, agency, or court: \_\_\_\_\_

(c) Date of filing: \_\_\_\_\_

(d) Docket number, case number, or opinion number: \_\_\_\_\_

(e) Result: \_\_\_\_\_

(f) Date of result: \_\_\_\_\_

(g) Issues raised: \_\_\_\_\_

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**Grounds for Your Challenge in This Petition**

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

**GROUND ONE:** The trial court erred in overruling Petitioner's Motion to Dismiss on double jeopardy grounds because the Double Jeopardy Clause prohibits the retrial of a criminal defendant following a mistrial, when the State provoked the Petitioner to seek a mistrial, and caused the trial court to grant a mistrial, by engaging in prosecutorial misconduct intended to cause a mistrial.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

On the first day of trial, September 19, 2017, it was discovered during the cross-examination of Officer Simmons that the State had failed to produce approximately 21 minutes of recorded footage of an interrogation of Michael Kitchen. The trial court subsequently issued an order prohibiting the State from utilizing any portion of the undisclosed footage in any manner. During the direct examination of the State's next witness, Officer Campbell, the Assistant Prosecutor violated the trial court's orders on two separate occasions by asking Officer Campbell about the undisclosed footage. Petitioner requested a mistrial, which the trial court granted.

(b) Did you present Ground One in all appeals that were available to you?

☒ Yes

☐ No

**GROUND TWO:** The trial court erred in overruling Petitioner's Motion to Dismiss on double jeopardy grounds because intent to cause a mistrial shall be inferred when the State engages in a series of acts of prosecutorial misconduct by repeatedly violating a trial court's orders barring the State from introducing certain evidence during a trial and the State would benefit from, and not be barred from, introducing such evidence during a retrial.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

The trial court issued an order prohibiting the State from admitting the undisclosed footage into evidence and prohibiting the State from eliciting testimony from any witness regarding any statements contained in the undisclosed footage. Because the State thought that portions of the undisclosed footage would be favorable to its arguments, the Assistant Prosecutor directly questioned Officer Campbell about statements made on the undisclosed footage, which the State was barred from doing, in order to goad the Petitioner into requesting a mistrial, so that the State would be able to use the footage in a retrial.

(b) Did you present Ground Two in all appeals that were available to you?

☒ Yes

☐ No

**GROUND THREE:**

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

(b) Did you present Ground Three in all appeals that were available to you?

☐ Yes

☐ No

**GROUND FOUR:**

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

(b) Did you present Ground Four in all appeals that were available to you?

☐ Yes

☐ No

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not:

**Request for Relief**

15. State exactly what you want the court to do: Petitioner requests a finding that the trial court's decision overruling his Motion to Dismiss the indictment on grounds that further prosecution violated Petitioner's right to be free from double jeopardy, was contrary to and involved an unreasonable application of clearly established federal law. To the limited extent that the trial court made factual findings, these findings so lacked support in the evidence before the trial court and the reasonable inferences derived therefrom, that this court should also find them to be unreasonable. The petition should be granted.

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**Declaration Under Penalty Of Perjury**

If you are incarcerated, on what date did you place this petition in the prison mail system:

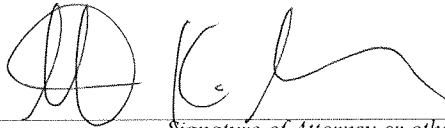
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I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date: \_\_\_\_\_



\_\_\_\_\_  
*Signature of Petitioner*



\_\_\_\_\_  
*Signature of Attorney or other authorized person, if any*